V. CONSULTATIVE REPORT ON GROUP 3 EMERGING SERVICES

This report considers unresolved issues concerning emerging services spanning numerous checklist item numbers. The emerging services include line sharing, subloop unbundling, packet switching, and dark fiber. The issues extend to nondiscriminatory interconnection with the local exchange network and nondiscriminatory access to unbundled network elements at just and reasonable rates.

Although transport issues were addressed in the same testimony and workshop days that included the four emerging services subjects, the facilitator included the discussion of transport issues in the report on UNEs. Workshops on Group 3 issues were filed held January 16-19, 2001 in Boise, Idaho, and March 27-28 and April 1, 2001 in Salt Lake City, Utah. Qwest filed the testimony of Karen A. Stewart on November 20, 2000. On or about December 20, 2000, the following intervenors filed testimony: the Wyoming Consumer Advocate Staff; AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc. and TCG affiliates; the Information Services Division, Department of Administration, State of Montana; Rhythms and New Edge (joint comments); and the New Mexico Advocacy Staff. Qwest filed rebuttal testimony on January 5, 2001, an open issues matrix on January 8, 2001 and a supplemental affidavit on January 9, 2001. AT&T filed a statement regarding dark spectrum on February 20, 2001. Qwest, AT&T, Sprint, Rhythms Links Inc., and the Wyoming Consumer Advocate Staff filed briefs on or about April 30, 2001.

On June 11, 2001, the facilitator filed its report on emerging services, including line sharing, dark fiber, subloop unbundling, and packet switching. The report identified agreed upon and unresolved issues. The report also contained the facilitator's proposed resolutions for unresolved issues.

On June 21, 2001, Qwest filed comments on the report and on June 25, AT&T Communications of the Midwest, Inc. (AT&T) filed comments on the report.

On June 27, 2001, the NDPSC issued a Notice of Hearing scheduling a formal hearing for July 30, 2001, in the Commission hearing room, State Capitol, 12th Floor, Bismarck, North Dakota. The NDPSC stated that it would consider issues that have been left unresolved in the final workshop report on emerging services and that have not been deferred to another portion of this Section 271 compliance investigation.

A formal hearing was held as scheduled on July 30, 2001. Qwest appeared at the hearing and presented testimony and evidence in support of its position. There was no appearance by intervenors. On September 12, 2001, Qwest filed a post-hearing memorandum on Group 3 issues.

On October 24, 2001, the NDPSC issued its Interim Consultative Report on Group 3 Emerging Services.

Case No. PU-314-97-193 Section 271 Consultative Report Page 80 On November 7, 2001, Qwest filed a Petition for Reconsideration on the Group 3 Consultative Report. Qwest requested that the NDPSC reconsider its recommendation regarding Qwest ownership of multi-tenant environment (MTE) cable and related SGAT provisions, compliance regarding subloop access, and pricing of packet switching. On November 21, the NDPSC granted Qwest's petition, and on December 12, 2001, the NDPSC held an informal hearing on Qwest's petition for reconsideration.

On May 30, 2002, Qwest filed a Notice of Updated Statement of Generally Available Terms and Conditions and filed its North Dakota SGAT – Sixth Revision dated May 30, 2002, which included an updated Qwest Performance Assurance Plan. The revised SGAT included a number of changes due to consensus and other language Qwest has agreed to at the request of the CLECs. On May 31, 2002, Qwest filed a Revised Notice of Updated Statement of Generally Available Terms and Conditions.

The following reflects the NDPSC's Consultative Report on Group 3 Checklist Items.

A. Line Sharing

1. Background

Line sharing refers to the unbundling of the high frequency portion of the local loop. Such sharing permits a CLEC to provide xDSL services over the high frequency portion of the loop, while the ILEC continues to provide voice service over the low frequency portion of the same loop. Line sharing operates through the use of splitters at the customer premises and at a central office or remote terminal.

The FCC required unbundled access to the loop's high frequency portion in its *Line Sharing Order.* The FCC said:

- (1) The high frequency portion of the loop network element is defined as the frequency range above the voice band on a cooper loop facility that is being used to carry analog circuit switched voice band transmissions.
- (2) An incumbent LEC shall provide nondiscriminatory access in accordance with section 51.311 of these rules and section 251(c)(3) of the Act to the high frequency portion of a loop to any requesting telecommunications carrier for the provision of a telecommunications service conforming with Section 51.230 of these rules.
- (3) An incumbent LEC shall only provide a requesting carrier with access to the high frequency portion of the loop if the incumbent loop is providing,

⁷⁸ Third Interconnection Order, CC Docket No. 98-147, and Fourth Report and Order, CC Docket No. 96-98, FCC 99-355(December 9, 1999) (*Line Sharing Order*).

and continues to provide, analog circuit – switched voiceband services on the particular loop for which the requesting carrier seeks access.

2. Overview

The parties raised a total of ten issues related to line sharing. Four of those issues were resolved during the Workshop. Four issues were presented to the NDPSC with the facilitator's proposed resolution. Two issues were deferred, one to the NDPSC cost docket and one to the Group 4 workshop.

The issues resolved between the parties are discussed in the Facilitator's Report on Emerging Services (Workshop Two Report) beginning on page 13. The resolved issues include:

- Collocating DSLAMs
- Direct Connections Option
- Requiring Separate CLEC "MELD" Runs
- Allowing for Direct Connection in Common Areas

The unresolved line sharing issues are discussed in the Workshop Two Report beginning on page 15. The issues include:

- Ownership of and Access to Splitters
- Tving Qwest Data Service and Voice Service
- Line Sharing Over Fiber Loops
- Provisioning Interval

The line sharing issue that was deferred to the NDPSC's cost docket related to:

Line Sharing Cost Elements.

The line sharing issue that was deferred to the Group 4 workshop related to:

• Line Splitting. This issue is discussed in the Consultative Report on Group 3 Checklist Items, Line Sharing, Line Splitting section of this report.

3. Analysis of Evidence on Unresolved Issues

a. Ownership of and Access to Splitters

AT&T maintained that Qwest should be required to own splitters and make them available to CLECs on a line-at-a-time basis. Qwest stated that CLEC ownership of POTS splitters necessary for line sharing was the method provided for in the original FCC Line Sharing Order. Qwest also said the FCC has upheld the position that ILECs need not provide access to their splitters in the SWBT 271 Order.⁷⁹

 $^{^{79}}$ SWBT Texas 271 Order at \P 330. (Complete cite in Cumulative Consultative Report)

The facilitator determined that existing FCC requirements do not obligate Qwest to provide splitters and make them available to CLECs on a line-at-a-time basis. Moreover, the evidence in this proceeding provided no basis for concluding that a requirement for such access is necessary or appropriate. Accordingly, the facilitator recommended there is not a basis for concluding that Qwest fails to meet checklist requirements by declining to provide splitters at its central offices for use by CLECS in support of line sharing. In addition, SGAT Section 9.4.2.3.1 allows for the location of CLEC splitters in common areas.

The NDPSC agrees with the facilitator's conclusion and no changes to Qwest's SGAT are required.

b. Tying Qwest's Data Service and Voice Service

AT&T objected to Qwest's policy to disconnect Megabit service from a Qwest retail customer that changes to a CLEC for local voice service over the same loop. Qwest argued that the FCC does not require an ILEC to provide xDSL service when it is no longer the voice provider. Qwest further argued that its practice was not a barrier to entry because CLECs could offer their own xDSL service or partner with another carrier.

The facilitator determined that Qwest's policy to discontinue Megabit services when a CLEC captures a customer for voice services gives grounds for concern. The facilitator recommended that Qwest should not be considered to be in compliance with public interest requirements as long as it maintains a policy of denying end users Megabit or xDSL services when it loses a voice customer to a CLEC through line sharing.

In its comments to the Workshop Two Report, Qwest agreed to continue providing Megabit to voice customers lost to CLECs as the Report contemplates by developing service terms and ordering processes to provide Megabit service to CLECs using UNE-Ps. In its Post Hearing Memorandum, Qwest committed to add the following to its SGAT filed with the Commission in North Dakota:

9.23.3.11.7 CLEC may order new or retain existing Qwest DSL service on behalf of end user customers when utilizing UNE-POTS, UNE-P-Centrex, and UNE-P-PBX (analog, non-DID trunks only) combinations, where technically feasible. The price for Qwest DSL provided with UNE-P combinations is included in Exhibit A to this Agreement. Qwest DSL service provided to Internet service providers and not provided directly to Qwest or CLEC's end users is not available with UNE-P combinations.

The Line Sharing Order obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, but it does not require that they provide xDSL service when

they are not longer the voice provider.⁸⁰ However, since the FCC does not prohibit Qwest from allowing an ILEC to provide xDSL service when Qwest is no longer the voice provider, the NDPSC agrees with the facilitator's recommendation. The NDPSC finds that Qwest has added the recommended Section 9.23.3.11.7 to the North Dakota SGAT.

c. Line Sharing Over Fiber Loops

CLECs argued that the SGAT should require Qwest to provide line sharing over fiber loops. Qwest said that although the FCC has recognized the possibility of line sharing over fiber portions of loops, it has not determined that such line sharing is feasible. Qwest added section 9.4.1.1 to its SGAT to provide for line sharing when the technologies and transport mechanisms are identified, and Qwest has developed such technology for its own use, and Qwest is obliged to provide access to such technology by law.

The facilitator determined there was no evidence of record that would support a conclusion that Qwest fails to provide any technically feasible form of line sharing over fiber. The facilitator found that Qwest's SGAT Section 9.4.1.1 acknowledges the need to address line sharing over fiber loops.

At the formal hearing, the NDPSC requested that an SGAT Section 9.4.1.2 be added that would allow a CLEC or DLEC (Data LEC) to request, through the Bona Fide Request (BFR) process, provisioning of additional line sharing technologies and other new technologies over fiber. Such a request would initiate an investigation of the technical feasibility of the request. In its Post Hearing Memorandum, Qwest proposed the following additional SGAT section in response to the NDPSC's request:

"9.4.1.2. CLEC may request through the BFR process additional Line Sharing technologies and transport mechanisms for provision by Qwest."

The NDPSC agrees with the facilitator's determinations and finds Qwest has made the proposed addition to its SGAT at Section 9.4.1.1. The NDPSC also recommends that the following language be added as SGAT Section 9.4.1.2:

"9.4.1.2. Notwithstanding any limitations of Section 9.4.1.1, CLEC may request, through the BFR process, any additional or new Line Sharing technologies and distribution transport mechanisms for provision by Qwest."

The NDPSC finds that, in its North Dakota SGAT Third Revision dated December 14, 2001, Qwest made the recommended addition to Section 9.4.1.2.

⁸⁰ Line Sharing Order at ¶ 72.

d. Provisioning Interval

Rhythms proposed that Qwest be required to provision line sharing in three days with a future reduction to one day rather than the five day provisioning interval included Qwest's SGAT.

Qwest argued that the FCC required ILECs to provision line sharing under intervals similar to those in which ILECs provide DSL service to their own end users. Qwest said that the five-day line sharing interval under its SGAT is significantly less than the ten-day retail DSL provisioning interval for its own end users. Qwest noted that the testimony would support a CLEC's need for a day or two (at most) in addition to Qwest's wholesale interval of five days, in which to provide a retail DSL service.

The facilitator recommended that the correct standard interval should be one that promotes parity with Qwest's retail performance provided that it: (1) recognize the extra time required by CLECs to complete work to initiate service needs to be accommodated, and; (2) to the extent that Qwest's total interval to initiate service includes unnecessary time subsequent to loop provisioning, there is no sound reason for imposing time inefficiencies on CLECs as well. The facilitator found that the record leads to the conclusion that Qwest's five day interval will allow ample opportunity overall for CLECs to complete remaining work in time to provide end users with xDSL services within timeframes that are competitive with what Qwest is now applying. The facilitator recommended that Qwest's five day interval is appropriate and, even allowing two days or more for additional CLEC work, will make CLEC service delivery times competitive with those of Qwest. The facilitator further recommended that Qwest's five day interval be accepted with the following conditions:

- It is based upon allowing parity in initiating service to end users as between CLEC and Qwest end users.
- It is based on the premise that Qwest provisioning is and remains at roughly ten days.
- It is subject to change if and as the ROC decides to change the PID based upon its consideration of results under the OP-4 diagnostic standard for line sharing.
- It is also subject to change as Qwest retail intervals drop, under the general standard that the CLEC line sharing interval should remain at two days less than Qwest's retail interval for xDSL services.
- It can be demonstrated that Qwest is: (a) provisioning more than 25 percent of CLEC line sharing orders without dispatch, (b) providing xDSL service to at least the same percentage of its own end users without dispatch, and (c) there is a demonstrated difference of more than two days in provisioning with versus without dispatch, then the CLEC provisioning interval will be disaggregated.

The modified SGAT filed by Qwest in North Dakota on July 10, 2001 reduces the line sharing provisioning interval from five days to three days. At the hearing before the Commission on July 30, 2001, Qwest testified that the revised provisioning interval reflected Qwest's commitment to provide CLECs with a reduced line sharing provisioning interval if Qwest is able to increase its efficiencies and OSS processes. Qwest testified that it would be difficult to incorporate in the SGAT the conditions proposed by the facilitator for a five-day interval because they were basically subjective statements. However, Qwest could give no reason why it should not be bound by the conditions.

The NDPSC agrees with Qwest's proposed three day provisioning interval for line sharing and also agrees with the conditions recommended by the facilitator that could provide for further reductions in the provisioning interval.

e. Line Sharing Cost Elements

AT&T noted that it did not agree with rate elements and prices included in the SGAT. The parties agreed that such issues should be considered in a cost docket. The NDPSC will address this issue in its *Interconnection/Wholesale Cost Investigation*. ⁸¹

f. Line Splitting

Line sharing contemplates that Qwest will continue to provide voice services over the same circuit that a CLEC uses to provide the same end user with data services. AT&T argued that the SGAT inappropriately failed to require Qwest to continue to provide data services over the same circuit that a CLEC uses to provide the same end user with voice services. This issue was deferred to the Group 4 issues workshop and is discussed in the facilitator's report at page 67 under "Discontinuing Megabit Service." The facilitator found that the resolution of this question under *Tying Qwest Data Service and Voice Service* under *Line Sharing* in this report remains valid.

4. Conclusion

Qwest has demonstrated that it will provide nondiscriminatory access to line sharing.

⁸¹ Case No. PU-2342-01-296

B. Subloop Unbundling

1. Background

The FCC requires ILECs to provide access to subloops where technically feasible. The FCC defines subloops as the portions of the ILEC loop that can be "accessed at terminals in the incumbent's outside plant." An accessible terminal "is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case." The FCC defines subloops as the portions of the ILEC loop that can be "accessed at terminals in the incumbent's outside plant." An accessible terminal "is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case."

2. Overview

The parties raised a total of sixteen issues for discussion on subloop unbundling. Of those issues, six were resolved during the workshop and three issues were deferred. The seven remaining issues were presented to the NDPSC with the facilitator's proposed resolution.

The issues resolved between the parties are discussed in the Workshop Two Report beginning on page 23. The resolved issues include:

- Subloop Definition
- Unbundling All Loop Types- except costs for subloop elements
- Spectrum Restrictions
- Subloop Ordering Information
- Rights of Way
- Dispute Resolution
- Copper Feeder and Fiber Subloops

The three issues deferred or addressed elsewhere are:

- Unbundling All Loop Types costs for subloop elements Deferred to State Cost Dockets
- Undefined Rates Deferred to State Cost Dockets
- Pricing for Overly Broad Definitions of Subloop Categories Deferred to State Cost Dockets

The unresolved issues are discussed in the Workshop Two Report beginning on page 27. The issues include:

- Subloop Access at MTE Terminals
- Requiring LSRs for Access to Premises Wiring at MTEs

 $^{^{82}}$ UNE Remand Order at ¶¶ 204 and 205. (Complete cite in Cumulative Consultative Report) 83 Id. at ¶ 206.

- CLEC Facility Inventories
- Determining Ownership of Inside Wire
- Intervals
- Requirement for Qwest-Performed Jumpering at MTEs
- Expanding Explicitly Available Subloop Elements

3. Analysis of Evidence on Unresolved Issues

a. Subloop Access at MTE Terminals

AT&T argued that access to wiring on customer premises as a subloop element at the terminal block in multi-tenant environments (e.g., campus type arrangements or high rises) should not require collocation. AT&T argued that the FCC has made it clear that technically feasible points for gaining access to subloops include accessible terminals at MTEs.⁸⁴ In particular, AT&T cited ILEC control over "on premises" wiring as a barrier to competition. AT&T phrased this issue in terms of whether the SGAT was consistent with FCC rules addressing NID access. AT&T cited the *UNE Remand Order* description of the NID as including:

all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism.⁸⁵

While agreeing to waive collocation requirements at MTE terminals inside buildings, Qwest continued to assert that CLECs must comply with collocation rules for access at nonstandard detached terminals.

The facilitator recommended that a rote application of collocation and CLEC access rules crafted primarily with reference to collocation in settings like central offices will not work well for access to subloops at remote locations. Rather, a more case specific approach is needed to consider the service reliability, safety, work efficiency, cost, and engineering and operating practices involved in terminal access. The facilitator recommended the following language be added to the SGAT to allow advance

AT&T Brief at page 40, citing In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket 88-57; First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57. (rel. October 25, 2000) ("MTE Order")

⁸⁵ UNE Remand Order at ¶233.

solutions to be worked out for particular configuration types, provided that the focus is on the factors relevant to those particular types:

- (a) For any configuration not specifically addressed in this SGAT, the conditions of CLEC access shall be as required by the particular circumstances. These conditions include: (1) the degree of equipment separation required, (2) the need for separate cross-connect devices, (3) the interval applicable to any collocation or other provisioning requiring Qwest performance or cooperation, (4) the security required to maintain the safety and reliability of the facilities of Qwest and other CLECs, (5) the engineering and operations standards and practices to be applied at Qwest facilities where they are also used by CLECs for subloop element access, and (6) any other requirements, standards, or practices necessary to assure the safe and reliable operation of all carriers' facilities.
- (b) Any party may request, under any procedure provided for by this SGAT for addressing non-standard services or network conditions, the development of standard terms and conditions for any configuration(s) for which it can provide reasonably clear technical and operational characteristics and parameters. Once developed through such a process, those terms and conditions shall be generally available to any CLEC for any configuration fitting the requirements established through such process.
- (c) Prior to the development of such standard terms and conditions, Qwest shall impose in the six areas identified in item (a) above only those requirements or intervals that are reasonably necessary.

Qwest made the recommended addition to its SGAT as Sections 9.3.1.1.2, 9.3.1.1.3, and 9.3.1.1.4.

As noted in the Group 2 portion of the NDPSC order in this proceeding, the NDPSC may not impose obligations on a telecommunications company that are different or greater than obligations imposed under the Act. ⁸⁶

In the Local Competition First Report and Order, the FCC noted that a competitor deploying its own loops must be able to connect those loops to customers' inside wiring in order to provide service, especially to customers in multi-tenant buildings.⁸⁷ In the UNE Remand Order, the FCC concluded that lack of unbundled access to the incumbent's NID impairs the ability of requesting carriers to provide the services that they seek to offer.⁸⁸ The FCC also found the demarcation point preferable to the NID in defining the termination point of the loop because, in some cases, the NID does not

⁸⁶ N.D.C.C. § 49-21-01.7(14)

Local Competition First Report and Order, 11 FCC Rcd at 15697, ¶. 392.
 UNE Remand Order at ¶233

mark the end of the incumbent's control of the loop facility. The FCC noted that in multiunit premises, there may be either a single demarcation point for the entire building or separate demarcation points for each tenant, located at any of several locations, depending on the date the inside wire was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Thus, depending on the circumstances, the demarcation point may be located either at the NID, outside the NID, or inside the NID. The FCC defined the NID to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.

The FCC further stated that:

We conclude that the NID definition, for the purposes of our unbundling analysis, should be flexible and technology-neutral. The Commission's rules permit considerable variation in the interconnection facilities between carrier and customer-controlled facilities. Furthermore, evolution in network design and technology will likely cause additional design variations among the hardware interfaces between carrier and customer premises facilities. Accordingly, we define the NID broadly to ensure that competitors will be able to obtain access to any of these facilities as an unbundled network element. Our intention is to ensure that the NID definition will apply to new technologies, as well as current technologies, and to ensure that competitors will continue to be able to access customer premises facilities as an unbundled network element, as long as that access is required pursuant to section 251(d)(2) standards.⁹³

The NDPSC agrees with Qwest's SGAT change incorporating the facilitator's proposed language for access to terminals (NIDs or demarcation points) for subloop elements. However, the NDPSC believes the FCC did not intend to treat NIDs or demarcation points located outside of buildings in a different manner than NIDs or demarcation points located inside buildings. Therefore, the NDPSC recommends that there be no collocation requirements at MTE terminals inside buildings or outside of buildings. The NDPSC recommends that Qwest be required to change its SGAT accordingly.

In addition, access to MTE terminals in North Dakota is unique because of past actions taken by the FCC and subsequent actions of the NDPSC. In its Second Report and Order in CC Docket No. 79-105⁹⁴, the FCC detariffed the installation of

⁸⁹ *Id.* at ¶168

⁹⁰ Id. at ¶169

⁹¹ Id.

⁹² Id. at ¶233.

⁹³ *Id.* at ¶234.

Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Second Report and Order, 51 Fed. Reg. 8498 (1986)

simple inside wiring and the maintenance of all inside wiring effective January 1, 1987. The FCC determined that allowing telephone companies to retain ownership of inside wiring after fully recovering the costs of that wiring from ratepayers would not be desirable. The FCC ordered telephone companies to relinquish all claims to ownership of "expensed" inside wiring by January 1, 1987, and of "capitalized" inside wiring by the end of the amortization period for the investment in that wiring. The FCC preempted the states from using different accounting procedures in setting intrastate rates.

The FCC order was appealed, and the Supreme Court held in Louisiana Public Service Commission that the FCC could not require states to use FCC-prescribed depreciation rates for intrastate ratemaking purposes. This decision therefore invalidated the FCC action requiring states to follow the methods prescribed by the FCC for the expensing of inside wiring costs beginning October 1, 1981, and the amortization of all capitalized inside wiring costs over a period of no more than ten years.

Even though the FCC reevaluated its overall program for inside wire in its Memorandum Opinion and Order in CC Docket No. 79-105, FCC No. 86-513, released November 21, 198695, and decided not to require that telephone companies relinquish claims to ownership of inside wiring, the NDPSC granted the requests of Northwestern Bell Telephone Company (NWB) to transfer ownership of and responsibility for inside wire96 and premises cable97 to its North Dakota customers and deregulate the installation and maintenance of that wire and cable. Inside wire was defined as that wire including connectors, blocks and jacks within a customer's premises that extends between the termination of the Exchange Access Line (the Network Interface) and those jack locations to which terminal equipment can be connected. NWB defined premises cable as any cable on private property, such as riser cable located within a building, and campus or lateral cable, which runs between buildings of a co-located complex such as a university.

In its request to remove premises cable from regulation, NWB stated it would suspend placing additional cable on private property unless done at customer expense and this would permit nondiscriminatory use of the facilities by vendors, customers and/or owners. NWB would provide facilities up to a "demarcation point" which normally would be at the building's closest point of entry. In an existing building, a demarcation point would be established, and work on the customer side would be charged on a "time and materials" basis or the customer could arrange for others to do the work. The demarcation point, in North Dakota, was defined as the physical location of the point where telephone company ownership of and maintenance responsibility for premises cable ends, and customer ownership and responsibility begins.98 NWB stated

⁹⁵ Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd. 1190 (1986)

 ⁹⁶ NDPSC Case No. I-7279, approved December 30, 1986.
 97 NDPSC Case No. 11,002, decided February 9, 1988.

⁹⁸ ld. finding 10.

customers would benefit from control of the cable on their premises, vendors would benefit because they would be able to use the cable at the customer's direction, ratepayers would no longer be subsidizing the costs of premises cable, NWB would have reduced capital requirements and administration, customer and vendor confusion would be lessened, future costs would be borne directly by the cost causer, and the potential for stranded premises cable investment caused by vendor misuse and changing technology would be reduced. In its request to remove premises cable from regulation, NWB stated:

On July 1, 1987, Northwestern Bell will transfer the responsibility for installation and maintenance for telephone wire and cable located on private property to the property owner. Premises cable and wire, like inside wire, will be owned by the customer following the amortization period. Premises cable is the telephone facility that interconnects a customer's buildings together or if a high-rise building interconnects different floors to the telephone public switched network. Inside wire is the facility within a building or floor that the customer already owns and maintains.

The shift in ownership will complete a plan that started when the Bell System was divested in 1984, which enabled customers to own telephone equipment.

The NDPSC's order in Case No. 11,002 required that, in the interest of providing the benefits of competition to the customer, the cable records should be given to the customer. The order agreed that title to premises cable be transferred to the customer at the end of the amortization period. The NDPSC took this action even though the FCC had chosen not to transfer title of inside wire to customers.

The tariff filed by NWB implementing the NDPSC's decision states:

The Demarcation Point will be mutually agreed upon between the company and the customer and will normally be located near the point where the telephone company's facility enters the customer's property, normally inside a building.

After July 1, 1988, for multiple buildings constructed on continuous property such as shopping centers, condominiums, industrial parks, campuses, and military installations, the telephone company will establish a single Main Demarcation Point and will designate one or more other existing connections as Alternate Demarcation Points.

For the network existing prior to July 1, 1988, for multiple buildings constructed on continuous property, the telephone company will establish a single Main Demarcation Point and may designate other existing terminating connections as Alternate Demarcation Points. Only one Main Demarcation Point will be reinforced at the telephone company's expense.

If requested, the telephone company shall provide a Main Demarcation Point to each rural agricultural residence, whether or not the residence is located on the continuous property.

Charges will be applied to cover additional costs of placing or reinforcing Alternate Demarcation Points requested by the property owner.

The NDPSC determined that the cost of providing, maintaining and reinforcing the Main Demarcation Point would be borne by NWB and that the cost of providing, maintaining and reinforcing any Alternate Demarcation Points would be borne by the customer requesting those points.

The FCC describes the demarcation point as the point that marks the division between telecommunications network wiring under LEC *control* and wiring under building owner/end user *control*. As noted earlier, the NDPSC defines the demarcation point as the physical location of the point where telephone company *ownership* of and maintenance responsibility for premises cable ends, and customer *ownership* and responsibility begins. The demarcation point is a physical connection between the network cable for which NWB has responsibility and the premises cable for which individual customers have responsibility.

In its Fourth Report and Order in CC Docket No. 88-57¹⁰⁰, the FCC noted its ongoing efforts to foster competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). The FCC found it important to remove obstacles to competitive access in this important portion of the telecommunications market.¹⁰¹

The FCC found that the benefits include increased availability of advanced services and was targeting actions to promote the continued deployment of competitive and advanced telecommunications services and reducing the substantial barriers that remain to deployment of these services in MTEs. 102

In order to reduce competitive carriers' dependence on the incumbent LECs to gain access to on-premises wiring, the FCC, in FCC 00-366, was establishing procedures to facilitate moving the demarcation point to the minimum point of entry (MPOE) at the building owner's request, and required incumbent LECs to timely disclose the location of existing demarcation points where they are not located at the

⁹ ld. page 4

¹⁰⁰ In the Matter of Review of Sections 68.104 and 68.213 of the commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, FCC 00-366, *Fourth Report and Order and Memorandum Opinion and Order*, Rel. October 25, 2000)

¹⁰¹ Id. Introduction page 2.

¹⁰² *Id.* page 7-8.

MPOE.¹⁰³ The MPOE is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3

We believe that the NDPSC has already accomplished the FCC goal of moving the demarcation point to the MPOE. Under the NDPSC order in Case No. 11,002, the demarcation point or Main Demarcation Point is to be located near the point where NWB's facility enters the property, normally inside a building. Therefore, the physical location of the FCC's MPOE and the NDPSC's Main Demarcation Point, in the case of premises cable, are the same with one exception. The NDPSC, in Case No PU-314-94-318, found that a modular home park development differs from "shopping centers." condominiums, industrial parks, campuses, and military installations because the homes in a modular home park are constructed by individuals rather than by a single developer and neither the per residence basic monthly charge for telephone service nor the per residence installation charge are reduced to the modular park developer. Therefore, the NDPSC determined that, for the purposes of providing telephone service, there is no reasonable basis for distinguishing residents who build on leased property from those who build on owned property. The NDPSC determined that installation of telephone service for the resident that occupies a home in a modular home park will be treated the same as the installation of telephone service for a regular residential development. In other words, the demarcation point would be located at or near the point where the NWB facility enters the residence. The NDPSC does not believe the modular home park falls under the FCC definition of an MTE, just as a single-family residence is not considered an MTE.

The NDPSC believes that many issues covered in the SGAT related to the MTE environment are moot due to the fact that, in North Dakota, the NDPSC continues to have the jurisdiction to define the location of the demarcation point and, under that definition, Qwest may own no intrabuilding cable or campus cable in MTE environments.

Qwest argues for retaining this MTE language for the sake of consistency in the SGAT in each state in Qwest's service territory Qwest also contends that the NDPSC order in Case No. 11,002 does not prohibit Qwest from owning premises cable or campus cable in the future.

Qwest's May 31, 2002 Revised Notice of Updated Statement of Generally Available Terms and Conditions now sets forth interim SGAT and other interim provisions to allow the issues regarding subloop unbundling at MTE locations in North Dakota to be addressed in a separate NDPSC proceeding. Qwest states as follows:

Qwest is filing revisions to its SGAT to address concerns regarding subloop unbundling at MTE locations in North Dakota in view of the

¹⁰³ *ld*. page 8.

questions regarding Qwest's right to own premises cable, campus cable or inside wiring under the Commission's order in Case No. 11,002. In particular, Qwest has added the following to section 9.3.1.1:

Due to the limited number of locations in North Dakota where Qwest owns premises cable, campus cable or inside wiring, Qwest will provide premises cable, campus cable or inside wiring ownership notification at each MTE Terminal.

Qwest has also amended section 9.3.5.4.1 to provide:

9.3.5.4.1. Where Qwest has provided Cable Ownership Notification, CLECs shall notify its account manager at Qwest in writing, including via email, of its intention to provide access to customers that reside within a MTE. Where Qwest does not provide a Cable Ownership Notification, CLEC and the landowner shall determine procedures for CLEC to connect its loops directly to on-premises wiring and CLEC access at all terminals or interface devices at the MTE is available under the terms of SGAT section 9.5.2.1.1.

Finally, Qwest has deleted section 9.3.5.4.1.1.

In addition, to the above referenced SGAT changes, Qwest agrees that, by both Qwest's definition and the Commission's definition of demarcation point, Qwest cannot own premises cable, campus cable, or inside wire on the customer side of a demarcation point in North Dakota. The issue of the location, in North Dakota, of the demarcation point and therefore the ownership of certain premises cable, campus cable or inside wire facilities, pursuant to the Commission's order in Case No. 11,002, will be decided by the Commission at a later date. The proceeding to determine this issue may be initiated by a request from Qwest for a declaratory order from the Commission.

Due to the limited number of locations in North Dakota, Qwest will provide "Cable Ownership Notification" where it has premises cable, campus cable, or inside wire facilities. Qwest will file with the Commission the locations where it provides Cable Ownership Notification. This filing will include information regarding the number and type of detached terminals, if any. Should a CLEC require access to such a detached terminal prior to resolution of the proceeding described above, Qwest will provide CLEC access to necessary campus wiring in the most expeditious manner available to cross-connect the CLEC facilities with the Qwest facilities. Prior to requiring collocation for the sole purpose of accessing campus wiring, Qwest will seek approval from the NDPSC. In these instances, Qwest will work collaboratively with the CLEC and the NDPSC to resolve any access disputes. To the extent there is any conflict between these commitment provisions and the SGAT, the commitments in this pleading will control. If the Commission determines, pursuant to the proceeding

described above, that Qwest is not prohibited pursuant to the Commission order in Case No. 11,002, from owning certain premises cable, campus cable or inside wire in North Dakota, Qwest would no longer be required to file the locations, unless that requirement was imposed pursuant to rule of the Commission.

If the Commission determines that Qwest is currently prohibited, pursuant to the Commission's order in Case No. 11,002, from owning premises cable, campus cable or inside wire in North Dakota, Qwest reserves the right to seek a determination that Qwest is or should be allowed to own premises cable, campus cable or inside wire in North Dakota notwithstanding the Commission's order in Case No. 11,002. If it is determined that Qwest is or should be allowed to own premises cable, campus cable or inside wire in North Dakota notwithstanding the Commission's order in Case No. 11,002, Qwest would no longer be required to file with the Commission its locations where it provides Cable Ownership Notification, unless that requirement was imposed pursuant to rule of the Commission.

Qwest will not charge CLECs for the use of premises cable, campus cable or inside wire until the completion of the proceeding described above. Qwest has done this by placing "0" as the subloop prices for premises cable, campus cable or inside wire services at MTE locations in the SGAT price list until the proceeding and issue are decided by the North Dakota Public Service Commission. Nonetheless, Qwest may charge for the use by CLECs of network cable located at modular home park developments on the Qwest side of demarcation points based upon the Commission's previous determination of Qwest's obligation to provide such network cable.

Pending the outcome of the Commission's determination of Qwest's right to own premises cable, campus cable or inside wire facilities, Qwest agrees it will not provide premises cable, campus cable or inside wiring without ten (10) days notice of the Commission pending the outcome of such proceeding. Qwest also recognizes that if it does install any premises cable, campus cable or inside wiring after such notice, it does so at its own risk such that if the Commission determines Qwest is prohibited pursuant to the Commission's order in Case No. 11,002 from owning such premises cable, campus cable or inside wire in North Dakota, Qwest will relinquish ownership of such cable and wire.

The NDPSC agrees that, because of the provisions set forth by Qwest in its May 31, 2002 Notice of Updated Statement of Generally Available Terms and Conditions, the MTE issues in North Dakota concerning ownership of premises cable, campus cable, and inside wire can be decided by the Commission at a later date. The NDPSC agrees with Qwest's proposed changes to SGAT sections 9.3.1.1, 9.3.5.4.1, and

9.3.5.4.1.1 and proposed price changes in Exhibit A of the SGAT concerning charges for subloop elements at MTEs. The NDPSC finds that Qwest has made those changes in its North Dakota SGAT – Sixth Revision dated May 30, 2002.

b. Requiring LSRs for Access to Premises Wiring at MTEs

AT&T argued that the requirement to submit LSRs to gain access to MTE premises wiring subloops unjustifiably discriminates against CLECs. AT&T argued that LSRs are a complex and expensive means for acquiring access to facilities that have nominal costs, and which Qwest can use for its own purposes without similar burdens. Rather than submitting an LSR, AT&T proposed that a CLEC specify monthly and in aggregate (by MTE terminal) the addresses of the MTEs where it has obtained access and the cables and pairs it is using there. AT&T stated that the cable and pair information would suffice to provide Qwest the carrier facility assignment (CFA) information needed to bill CLECs, and the proposed monthly notifications, combined with its proposal that all parties identify their facilities separately, would be adequate notice to Qwest for maintenance and repair purposes.

Qwest argued that LSRs represent an industry standard for wholesale orders generally. It maintained that the LSR information that it requires for subloops is necessary for the following reasons:

- Allowing the CLEC representative to validate that interconnection point information is valid and will be accepted
- Providing billing information without which inefficient manual billing systems would be required
- Providing the information Qwest needs to fulfill its maintenance and repair obligations
- Providing in a readily available format the information necessary to allow customers later to switch to other carriers smoothly
- Preventing unexpected problems in connecting a customer who moves into vacated premises, but wishes to take service from a different carrier than the one serving the customer who vacated
- Putting burdens on technicians to make uninformed decisions about installation or service matters.

The facilitator stated that because Qwest is entitled to bill for the wiring if it owns it. Qwest is also entitled to regularity and completeness for billing purposes. The facilitator also stated that Qwest has a legitimate business need to have the information it needs to respond efficiently to repair requests. The facilitator determined that LSRs provide an efficient means of getting Qwest billing systems the information Qwest needs to bill for the wiring it owns.

The facilitator noted that the AT&T solution is not rigorous enough to offer Qwest what it is entitled to have when it makes its facilities available for CLEC use at subloop

elements. The facilitator recommended there should be no general waiver of LSR requirements for CLEC access to Qwest's on-premises MTE wire as a subloop element. Nonetheless, the facilitator recommended that if there is a way to provide for an alternate method for submitting LSRs to avoid costs or delay, the circumstances warrant it. At the workshop, Qwest agreed to allow AT&T immediate access and suspend certain LSR information requirements for five days. The facilitator determined this approach "provides an effective balancing of the concerns of Qwest and AT&T." Accordingly, the facilitator recommended the following language be added to the SGAT:

For access to Qwest's on-premises MTE wire as a subloop element, a CLEC shall be required to submit an LSR, but need not include thereon the circuit-identifying information or await completion of LSR processing by Qwest before securing such access. Qwest shall secure the circuit-identifying information, and will be responsible for entering it on the LSR when it is received. Qwest shall be entitled to charge for the subloop element as of the time of LSR submission by CLEC.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended addition to its SGAT at Section 9.3.5.4.7.

c. CLEC Facility Inventories

Qwest's SGAT Section 9.3.3.5 requires that Qwest inventory CLEC cable and pair terminations at MTEs. AT&T proposed an alternative requirement that Qwest, at its expense, mark its owned or controlled on-premises wire and related facilities, tagging each cable pair currently being used by Qwest to serve an end user.

Qwest argued that inventories needed to be completed before, rather than after, CLECs have completed their installation process. Qwest inventories of CLEC facilities provide addressing information for subloop terminations, which are recognizable when a CLEC issues a LSR for a subloop.

The facilitator determined that the inventories may be performed during the LSR suspense period as they provide information necessary for LSRs. Accordingly, the facilitator recommended that AT&T's alternate facility identification proposal should not be adopted.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

d. Determining Ownership of Inside Wire

SGAT Section 9.3.5.4.1 allowed Qwest ten days to determine what on-premises wire Qwest owned. AT&T requested that CLECs be allowed to rely upon an owner's declaration of ownership of on-premises wire, thus negating the need to await Qwest's

determination. Absent an owner's self-declaration of ownership, AT&T's proposal would allow Qwest ten days to determine ownership, but would limit the response period to one day at MTEs where another CLEC had already sought Qwest ownership information. AT&T would also require Qwest to absorb the cost of the ownership determination.

Qwest supported its existing SGAT language because it provides a reasonable way for determining where exactly its maintenance and repair obligations would extend.

The facilitator stated that the issue has two aspects: (1) responsibility for the Qwest costs involved in determining ownership, and (2) whether and by how much the ownership determination should delay CLEC access to subloop UNEs. The facilitator stated that Qwest is entitled to payment only if it owns the facilities or the rights to their use, and that it is reasonable to place upon Qwest the burden of determining facility ownership before it charges for those facilities. Therefore, Qwest should be responsible for the costs of such determination beyond reasonable and minimal costs for examination of its records. The facilitator also recommended that Qwest should be entitled to reimbursement for any incremental ownership determination actions that it is forced to undertake as a result of bad faith CLEC actions associated with an assertion of ownership by parties other than Qwest. Because much of the pricing for its subloop elements remains to be initially determined by Qwest, the facilitator recommended that Qwest should complete the design of its pricing in accord with these requirements.

Regarding the timing for determining ownership of inside wiring, the facilitator recommended that determining ownership should take only a nominal time period after the issue has already been raised by another CLEC at the same MTE. Moreover, when a CLEC can provide Qwest with a written statement setting forth a reasonably clear, supported, and complete basis for a claim that the MTE owner also owns the on-premises wiring, the period should be reduced. Therefore, the facilitator recommended that SGAT Section 9.3.5.4.1 should be revised to include the following:

In the event that there has been a previous determination of on-premises wiring ownership at the same MTE, Qwest shall provide such notification within two (2) business days. In the event that CLEC provides Qwest with a written claim by an authorized representative of the MTE owner that such owner owns the facilities on the customer side of the terminal, the preceding ten (10) day period shall be reduced to five (5) calendar days from Qwest's receipt of such claim.

The NDPSC agrees with the facilitator's recommendation and finds that, should the NDPSC in the future determine that Qwest may own campus cable, premises cable or inside wire as discussed under *Subloop Access at MTE Terminals* of this report, Qwest should include the facilitator's recommended addition to SGAT Section 9.3.5.4.1.

The NDPSC finds that, because of the provisions set forth by Qwest in its May 31, 2002 Notice of Updated Statement of Generally Available Terms and Conditions,

and that the MTE issues in North Dakota concerning ownership of premises cable, campus cable, and inside wire can be decided by the NDPSC at a later date the SGAT need not provide a time period for determining ownership of inside wire. We find that Qwest has revised its SGAT accordingly in the North Dakota SGAT – Sixth Revision dated May 30, 2002.

e. Intervals

AT&T requested that In the event of non-acceptance of its previous arguments about the Field Connection Point ("FCP") process, the determination of on-premises wire ownership, and the inventorying of circuit terminations, AT&T asked that the longest interval for determining ownership and inventorying be not greater than fifteen days.

The facilitator determined that the FCP requirements have been eliminated for on-premises wiring access in a number of MTE situations; the LSR requirements have been eased; the need for a facility inventory is no longer a prerequisite to LSR issuance; and much of AT&T's argument regarding facility inventorying has been accepted. The facilitator therefore recommended there is no reason to consider added relief on the issue of intervals.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

f. Requirement for Qwest-Performed Jumpering at MTEs

AT&T argued that the SGAT Section 9.3.6.4 requirement that Qwest run the jumpers from subloop elements or disconnect Qwest equipment allows for abuse by Qwest.

Qwest argued that the provision was consistent with the practice of other RBOCs, and that it was consistent with legal precedent addressing the ability of ILECs to segregate their equipment in collocation contexts. Qwest also argued that because the segregation of CLEC and Qwest equipment was not realistic at FDIs, allowing only Qwest technicians to have access to the FDIs for jumpering was a reasonable substitute. Qwest agreed to eliminate a distinction that it had been making between enclosed and open terminals that were located in MTE buildings. It also agreed to eliminate requirements that CLECs establish at MTE terminals the separate cross connect field that Qwest earlier required in order to avoid technician uncertainty about facility ownership. Although Qwest agreed to allow CLECs to run jumpers at inbuilding MTE terminals, it was not willing to extend this approach to other MTE terminals.

¹⁰⁴ Stewart Rebuttal at page 29, citing *GTE v. FCC*, 205 F.3d 416 (D.C. Circuit 2000).

The facilitator noted that the recommended solution for the first unresolved subloop issue, Subloop Access at MTE Terminals, provided for a case-by-case analysis of the needs and circumstances associated with unique and varying outside plant configurations and conditions. That recommended solution included issues associated with jumpering. The facilitator recommended that the record here does not support allowing CLECs to perform such work outside the context of in- or on-building MTE terminals. However, CLECs can request such authority as described under the first issue and it should be granted to them where its propriety can be supported by showings made in the context of specific requests.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

g. Expanding Explicitly Available Subloop Elements

AT&T argued that the SGAT must address the full range of subloop elements and access points contemplated by the FCC, which AT&T listed as including a large number of specific types and access points. AT&T objected to the requirement that access other than through "standard" means prescribed by SGAT Section 9.3.4 be decided through the BFR process. AT&T recommended that the SGAT be changed to provide for access to all available subloop elements.

Qwest responded that it agreed to provide access to subloop elements at all technically feasible points and accessible terminals. Qwest argued, however, that the "very limited" demand for subloops to date and the very large number of potential subloop access points made it impractical to develop standard offerings for more than the most likely expected circumstances. Qwest offered the Special Request Process for additional loop offerings for which there is not substantial "reasonably foreseeable demand."

The facilitator recommended because of the wide range of configurations and circumstances, that it is not appropriate to expect Qwest to undertake the effort to design standard offerings for every conceivable case, without reference to potential demand for them. The facilitator determined that Qwest's offering of the Special Request Process provides an adequate mechanism for considering such offerings when they become more tangible.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for subloop unbundling.

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C. Packet Switching

1. Background

The FCC defines packet switching as:

The function of routing individual data units, or "packets," based on address or other routing information contained in the packets.

In its *UNE Remand Order*, the FCC required ILECs to unbundle packet switching when four conditions are met: 105

- Qwest has provided end users with loops aided by digital loop carrier or a system that replaces copper with fiber optic equipment in distribution facilities
- Qwest does not have spare copper loops that will provide adequate home run capability
- Qwest has not permitted CLECs to deploy CLEC DSLAMs at Qwest remote terminals or other suitable interconnection points in the area in question
- Qwest has deployed packet switching capability for its own use

The FCC considers the DSLAM (digital subscriber loop access multiplexer) a part of the functionality of packet switching. DSLAMs split the voice and data signals carried over copper wire. The voice portion is transmitted toward a typical telecommunications switch, while the data signals are transmitted to a packet switch.

2. Overview

The parties raised thirteen issues relating to packet switching. Of those issues, seven were resolved during the workshop. Four issues were unresolved and presented to the NDPSC with the facilitator's proposed resolution. Two issues were deferred to the state's cost dockets.

The issues resolved between the parties are discussed in the Workshop Two Report beginning on page 39. The resolved issues include:

- Defining Packet Switching
- Defining the Condition Regarding No CLEC Collocation of DSLAMS
- Access at Any Feasible Point
- Availability of CLEC-Specified Packet Switching Options
- Limiting Access to Packet Management Systems
- Satisfying the Condition Relating to DSLAM Collocation Denial

¹⁰⁵ UNE Remand Order at ¶313.

Maintenance and Repair Responsibilities

The unresolved issues are discussed in the Workshop Two Report beginning on page 41. The unresolved issues include:

- Availability of Spare Cooper Loops
- Denial of DSLAM Collocation
- Unbundling Conditions as a Prerequisite to Ordering
- Line Card "Plug and Play"

The issues deferred to the state's cost dockets include:

- Separate Rate Elements for Packet Switching Components
- ICB Pricing

3. Analysis of Evidence on Unresolved Issues

a. Availability of Spare Copper Loops

AT&T argued that access to a continuous, suitable copper loop between the end user and the Qwest home office (a "homerun" copper loop) in lieu of unbundled packet switching, will leave CLECs at a significant disadvantage when Qwest can transfer signals at much higher rates in areas where it's remotely deployed DSLAMS shorten the copper portion of its connection with end users. AT&T maintained that CLECs need to be able to: (a) collocate their DSLAMs at the same place that Qwest has done, or (b) gain access to Qwest's packet switching as a UNE, in order to be able to deliver service at the same level of quality. AT&T also argued that it should not have to take copper loops in lieu of unbundled packet switching in cases where it seeks to serve more customers than there are available appropriate copper loops.

Qwest objected to these changes noting that AT&T's proposal would extend Qwest's obligation beyond what the FCC has required.

The facilitator noted that the SGAT already says that the test for determining necessary loop capability is the services the CLEC wishes to offer (including the data transfer rate). If a CLEC wishes to offer xDSL services that match all the characteristics of the service that Qwest is providing, then Qwest cannot meet its obligations by providing a copper loop that can only provide some level of service less than that, even if the loop could provide some defined level of DSL service. The facilitator recommended that because the SGAT already provides that copper loops must support services that are at parity if that is what a CLEC requests, and because the ability to deliver service at parity is what AT&T seeks, there is no need to alter the SGAT to give CLECs adequate protection. The facilitator also recommended that AT&T's sufficiency argument does not have merit. The FCC has made it clear that where copper loops are available and sufficient, providing them constitutes full satisfaction of Qwest's requirements. AT&T's addition of sufficiency also would change the basis for

determining copper loop availability from the number of orders (or end users) involved to the number that AT&T would like to serve, assuming that its marketing plans succeeded. Giving CLEC's the ability to alter Qwest's obligations on the basis of expectations of the CLEC as opposed to firm orders for facility access could have the effect of eviscerating the FCC's conditions. The facilitator concluded there was no need to alter the SGAT.

The NDPSC agrees with the facilitator's conclusion and there is no need to change the SGAT.

b. Denial of DSLAM Collocation

AT&T sought a change in SGAT Section 9.20.2.1.3 in order to expand the standard for obtaining unbundled packet switching from actual denial of DSLAM collocation by Qwest to economic infeasibility of CLEC DSLAM collocation. AT&T argued that the significant costs and lead time and the small number of customers to be served from such DSLAMs would make it extremely difficult for CLECs to make enough money to justify deployment of their own facilities. Therefore, AT&T wanted to include SGAT language that would require Qwest to allow DSLAM collocation wherever it is economically infeasible for the CLEC to construct its own DSLAM.

Qwest argued there was no evidentiary support for the argument about economic infeasibility, and in any case, this request exceeded the scope of these workshops by asking for the introduction of new obligations. Qwest also argued that *AT&T Corporation v. lowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999), requires the imposition of more than nominal added costs to meet the "impairment of competition" test for unbundling.

The facilitator noted that AT&T's argument assumes there is a substantial difference in the economics of DSLAM deployment between CLECs and Qwest, however, there is nothing in the record to support this assumption. The facilitator also noted that AT&T's request would add an entirely new requirement to those already deemed appropriate by the FCC. The facilitator therefore recommended there is simply no sound basis for deciding that the FCC conditions regarding DSLAM collocation should be supplanted by the addition of an economic feasibility test.

The NDPSC agrees with the facilitator's recommendation.

c. Unbundling Conditions as a Prerequisite to Ordering

AT&T argued that CLECs would suffer competitive disadvantage under SGAT Section 9.20.4.1, which requires the 90-day collocation process, after which a CLEC could learn the collocation had been denied. Only after that denial would the CLEC be able to order packet switching as a UNE. AT&T sought changes that would permit

simultaneous ordering of DSLAM collocation and packet switching UNE requests, and an interval of 10 days or less for Qwest to reject DSLAM collocation requests.

Qwest agreed to streamline the processes involved in unbundling packet switching by disclosing to CLECs the locations where Qwest has remotely deployed DSLAMS, by providing a space availability report indicating where there is not space at such locations, and by providing, on CLEC request, a list of locations where Qwest had made decisions to remotely deploy future DSLAMs.

The facilitator noted that the combination of Qwest's disclosures about its current and future DSLAM locations and the issuance of space availability reports should provide substantially faster notice than AT&T had anticipated. Therefore, the facilitator recommended that the introduction of a 10-day collocation denial notice period does not appear to be warranted. The facilitator determined, however, that there was no showing of any necessity for packet switching requests to await DSLAM collocation denials. Accordingly, the facilitator recommended the SGAT should make clear that Qwest is required to respond to DSLAM collocation orders and packet switching orders in parallel.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has modified its SGAT at Section 9.20.4.1.2 in accordance with the facilitator's recommendations.

d. Line Card "Plug and Play"

Sprint argued for the right of CLECs to place their line cards in Qwest's DSLAM (an option known as "Plug and Play").

Qwest opposed the plug and play option because the FCC is now considering the issue but has not yet concluded whether it is appropriate. Qwest also argued that the record does not address the technical feasibility of this option and allowing it would be tantamount to eliminating the four conditions the FCC said were appropriate prerequisites to unbundled packet switching. Qwest's brief states that "[t]he fact that the FCC is considering whether to create a new obligation confirms that no such requirement currently exists." 106

The facilitator recommended that given the pendency of the FCC proceedings on the technical feasibility of this option, there is insufficient evidence on the record to support the conclusion that technical feasibility is established. Moreover, allowing the plug and play option would in effect eviscerate the current FCC standard. The facilitator concluded that no change be made to the SGAT concerning this issue.

The NDSPC agrees with the facilitator's conclusion.

¹⁰⁶ Qwest brief at page 13.

e. Separate Rate Elements for Packet Switching Components

AT&T expressed concern that the establishment of separate rate elements for the Customer Channel, the Switch Loop Capability, and the Switch Interface Port, suggested the existence of not one, but three separate UNEs. Qwest replied that there is only one packet switching UNE, but that the way it costed the element produced three rate elements, which had the benefit of allowing CLECs to save costs if they could self-provision the associated transport elements. Qwest also acknowledged that the reasonableness of the magnitudes of these elements would be better considered in cost dockets.

f. ICB Pricing

AT&T commented that Qwest presented no testimony about its price or provisioning practices for unbundled packet switching. AT&T argued that it was not sufficient to offer ICB pricing and that Qwest must at least insert specific prices, not merely ICB pricing, into the SGAT.

At the workshop, Qwest noted it is currently developing packet switching prices and that ICB pricing is an adequate interim solution for purposes of Section 271.

The facilitator noted that although Qwest has agreed to develop prices for unbundled packet switching, ICB pricing subject to eventual true-up is currently a feasible approach.

The NDSPC finds that Qwest has now included prices for unbundled packet switching in an updated SGAT file with the NDPSC on July 10, 2001 as shown on page 13 of Exhibit A, Item 9.24. The reasonableness of these prices will be subject to review in the NDPSC's cost docket.¹⁰⁷

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for providing CLEC access to packet switching.

¹⁰⁷ Qwest Corporation Interconnection/Wholesale Price Investigation, NDPSC Case No. PU-2342-01-296.

D. Dark Fiber

1. Background

Paragraph 174 of the *UNE Remand Order* provides that the loop element includes dark fiber. The FCC defined dark fiber as fiber that has not been activated by connection to electronics, but that is nevertheless "in place and easily called into service." Paragraph 325 of that FCC order similarly treats the dedicated transport element as including fiber that it is in place, but that is unlit by electronics. Thus, the FCC has decided that the loop and transport elements to which CLECs may gain access may consist of dark fiber.

2. Overview

The parties raised twelve issues for discussion on dark fiber. Of those issues, eight were resolved during the workshop. Three issues went to impasse and were presented to the NDPSC with the facilitator's proposed resolution. One issue was deferred to the workshop on SGAT general terms and conditions.

The issues resolved between the parties are discussed in the Workshop Two Report beginning on page 49. The resolved issues include:

- Dark Fiber Forecasts
- Access to Dark Fiber Without Collocation
- Testina
- Addition to D-UDF rate elements
- Purchase of a Single Dark Fiber Strand
- Provisioning and Ordering Processes
- Dark Fiber at Collocation Build-Out Completion
- Cross Connect Charges

The unresolved issues are discussed in the Workshop Two Report beginning on page 52. The unresolved issues include:

- Affiliate Obligations to Provide Access to Dark Fiber
- Access to Dark Fiber in Joint Build Arrangements
- Applying a Local Exchange Usage Requirement to Dark Fiber

The dark fiber issue that was deferred to the workshop on SGAT general terms and conditions dealt with:

• Consistency With Technical Publications. This issue is discussed in the Consistency With Technical Publications section below.

3. Analysis of Evidence on Unresolved Issues

a. Affiliate Obligations to Provide Access to Dark Fiber

AT&T contended that Sections 251(c)(3) and 252(d)(1) of the Act obligate Qwest to make the in-region dark fiber of affiliates, specifically Qwest Communications International, Inc. ("QCI"), available to CLECs. AT&T argued that Section 251(c)(3) obligates ILECs to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, and under rates and conditions that are fair, just and reasonable. According to AT&T, Qwest and its affiliates comprise "successors and assigns" under Section 251(h) of the Act, which makes them subject to ILEC unbundling duties thereunder.

Qwest contended that Qwest Corporation is the only U S WEST Communications, Inc. successor that provides local telecommunications services in the seven-state region. The QCI affiliates have neither provided, nor have they acquired, any affiliate that provides local exchange service. Furthermore, according to Qwest, QCI's affiliates do not meet the "successor or assign" requirements of Section 251(h) of the Act.

The facilitator determined that the record here contains no evidence that the Qwest corporate structure has been developed or is being used to deny access to dark fiber in cases where it would, absence such structure, be required to be made available. The facilitator stated that AT&T has cited no authority to support an obligation of all Qwest affiliates to unbundle generally, exactly as if they were Qwest itself. facilitator recommend there is no basis in the record for requiring dark fiber or other unbundling by affiliates because they are successors or assigns. Nonetheless, the facilitator recommended that where Qwest has acquired a general right to use dark fiber from a third party when and as needed, Qwest should not deny similar access to a CLEC merely on the basis that the inventory was technically owned by a third party. The same general standard should apply to a second-party arrangement (i.e., a lease or right to use agreement with an affiliate) as would apply to a third party arrangement (e.g., Qwest rights to dark fiber that arise under a lease with a financial institution or under a right to use agreement with a customer). The standard should be that if Qwest has some access rights for itself, it should not refuse to use them to provide access rights for CLECs. The facilitator recommended that Qwest should be required to provide access not only to what it owns directly, but to all dark fiber to which it has a right to access for local telecommunications use under agreements with any other party, affiliated or not. Accordingly, the facilitator recommended the addition of the following language to the end of SGAT Section 9.7.1:

Deployed Dark Fiber facilities shall not be limited to facilities owned by Qwest, but will include in place and easily called into service facilities to which Qwest has otherwise obtained a right of access, including but not

limited to capitalized Indefeasible Right to Use (IRUs) or capitalized leases. Qwest shall not be required to extend access in a manner that is inconsistent with the restrictions and other terms and conditions that apply to Qwest's access; however, in the case of access obtained from an affiliate: (a) the actual practice and custom as between Qwest and the affiliate shall apply in the event that it provides broader access than does any documented agreement that may exist, and (b) any terms restricting access by CLECs that are imposed by the agreement with the affiliate (excluding good-faith restrictions imposed by any agreement with a third party from whom the affiliate has gained rights of access) shall not be applied to restrict CLEC access.

AT&T in its Exceptions and Comments on Workshop Two-Report on Emerging Services proposed that the facilitator's recommendation be extended to apply to all unbundled network elements provided to Qwest by Qwest's affiliates. They recommended that the words "Deployed Dark Fiber facilities" found at the very beginning of the facilitator's proposal be changed to "Deployed Unbundled Network Element facilities" and that this revised language be included at the end of SGAT Section 9.1, not section 9.7.1.

Qwest testified at the NDPSC's July 30, 2001 hearing that a modification to SGAT Section 9.1 was unnecessary because UNEs provided over leased facilities are integrated into Qwest's network and must be made available to CLECs.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended addition to Section 9.7.1 of its SGAT.

b. Access to Dark Fiber in Joint Build Arrangements

AT&T contended that the Act and the FCC Orders called for the conclusion that CLECs should be permitted to lease dark fiber that exists in "joint build arrangements" with third parties. Such arrangements, according to AT&T, comprise those that permit either Qwest, the third party, or both to use the other party's conduit, innerduct, or fiber to transport telecommunications traffic.

Qwest testified that it would make available dark fiber in joint build arrangements up to Qwest's side of the meet point. Qwest refused to permit CLECs to obtain access to any rights Qwest may have to the use of the "third party facilities." Qwest stated its willingness to unbundle dark fiber that it owns but contended it could not and would not unbundle dark fiber belonging to other entities.

The facilitator recommended the standard to which Qwest should be held on this issue is similar to that set forth in the proposed resolution of the immediately preceding issue. The primary consideration is whether the agreement with the third party gives Qwest, with respect to the fiber owned by the third party, sufficient access rights to

make it analogous to directly owned facilities that "carriers keep dormant but ready for service" and that are "in place and easily called into service." The facilitator recommended that the additional language to Section 9.7.1 set forth in the proposed resolution of the immediately preceding issue accommodates this definition and should also be a means of holding Qwest to a good-faith standard in bargaining away its rights to allow CLEC access in such situations.

The NDPSC agrees with the facilitation's recommendation.

c. Applying a Local Exchange Usage Requirement to Dark Fiber

SGAT Section 9.7.2.9 prohibits the use of unbundled dark fiber as a substitute for special or switched access services, except to the extent the CLEC provides "a significant amount of local exchange traffic" to its end users over the fiber as set forth by the FCC's usage test.

AT&T stated that the usage test was issued by the FCC regard to Enhanced Extended Links (EELs). AT&T argued that the usage test when applied to dark fiber is prohibited by the FCC's *UNE Remand Order* and the FCC rules. The usage test is designed to apply to a single end user and cannot be applied to dark fiber that is typically used for multiple end users.

Qwest responded that EELs comprise combinations of the loop UNE and the transport UNE. Qwest said that dark fiber is not a UNE per se, but rather a "flavor of loop and transport," like EELS, which are a combination of loop and transport under paragraphs 477 and 480 of the UNE Remand Order. Therefore, the local traffic exchange restrictions should be applied to dark fiber loop and transport combinations. Qwest argued that eliminating the local service restriction on dark fiber and transport unbundling would present a threat to access revenues and universal service.

The facilitator determined that when a CLEC secures access to dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures an EEL, which is a combined loop and transport element. That dark fiber makes up this combination does not give it a different identity as a UNE. The FCC prohibits substitution of an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. The FCC recommended that AT&T's argument is without foundation because the logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them.

The FCC at paragraph 21 of the *Supplemental Order on Clarification* regarding Enhanced Extended Links stated that:

The local usage options we adopt below thus provide a safe harbor that allows the Commission to preserve the status quo while it examines the issues in the Fourth FNPRM in more detail, while still allowing carriers to use combinations of unbundled loop and transport network elements to provide local exchange service.

The NDPSC agrees with the facilitator's conclusion that when a CLEC secures access to dark fiber and uses the fiber to provide the functionality of a loop, and that loop is connected to dedicated transport, the combined functions are the same as those provided by an EEL. In addition, the FCC is examining the issues related to EELs and may change the local traffic exchange restrictions which should be made manifest as changes to the SGAT. Therefore, NDPSC agrees with the facilitation's recommendation.

d. Consistency With Technical Publications

AT&T noted that SGAT Section 9.7.2.18 incorporated by reference Technical Publication 77383 that AT&T believes is inconsistent with the commitments Qwest has made in the language of the SGAT. AT&T proposed that until Qwest submits language for the publication conforming to the requirements of the SGAT on dark fiber, the Commission should find Qwest not in compliance with this section of the 271 requirements.

The facilitator recommended that to the extent this issue is not resolved by the parties, it could be addressed in the upcoming workshop on general SGAT terms and conditions. The facilitator noted that there has already been adopted the general proposition that the hierarchy among the SGAT, technical publications, operations guidelines and procedures, and the other documents that it will take to make the Qwest/CLEC relationship operate effectively, can best be addressed in a general fashion.

The workshop on Group 5 included issues related to *General SGAT Terms and Conditions*. In the Group 5 section of this report under *General SGAT Terms and Conditions: Conflicts Between the SGAT and Other Documents*, it was found that the SGAT makes it clear that the SGAT prevails over other documents that abridge or expand the rights or obligations of each party to the SGAT. However, the NDPSC does not believe this finding resolves the issue of SGAT provision's inconsistency with Technical Publication 77383 since Technical Publication 77383 is itself made part of the SGAT by reference.

Supplemental Order on Clarification, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96098, FCC 00-183, rel. June 2, 2000. (Supplemental Order on Clarification).

AT&T's brief filed with the facilitator stated, "the technical publication does not allow CLEC's to lease dark fiber between the Qwest wire center and a CLEC wire center, does not allow for direct connection, and does not allow CLECs to lease single fibers." Qwest has indicated that revisions have been made to Technical Publications 77383 and 77386. Technical Publication 77383 "Unbundled Dark Fiber" lists an unbundled dark fiber route between a Qwest Wire Center and a CLEC wire center as an "Extended UDF" and does not appear to disallow this arrangement. Technical Publication 77383 also states that UDF is available as single optical fiber strands. Technical Publication 77386 "Interconnection and Collocation for Transport and Switched Unbundled Network Elements and Finished Services" seems to allow for direct connection by stating that the Network Interface for fiber or optical UNEs can be a Direct Connection and stating that direct connection of a CLEC entrance facility to UNEs is available when permitted by tariff, contract or regulatory order.

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for providing CLEC access to dark fiber.